(10)

Supreme Court, U.S.
FILED
APR 29 2005
OFFICE OF THE CLERK

No. 04-698

In The Supreme Court of the United States

BRIAN SCHAFFER, A MINOR BY HIS PARENTS AND NEXT FRIENDS, JOCELYN AND MARTIN SCHAFFER, *ET AL.*,

Petitioners,

v.

JERRY WEAST, SUPERINTENDENT OF MONTGOMERY COUNTY PUBLIC SCHOOLS, *ET AL.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE ARC OF THE UNITED STATES, AUTISM SOCIETY OF AMERICA, EPILEPSY FOUNDATION, NAMI, UNITED CEREBRAL PALSY, AND THE NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DREW S. DAYS, III
Counsel of Record
SETH M. GALANTER
LINDA A. ARNSBARGER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
(202) 887-1500

Counsel for Amici Curiae

APRIL 29, 2005

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

PLACING THE BURDEN OF PROOF ON A SCHOOL DISTRICT AT A DUE PROCESS HEARING TO SHOW THAT IT IS PROVIDING A FREE APPROPRIATE PUBLIC EDUCATION TO A CHILD WITH A DISABILITY IS WARRANTED BY SCHOOL DISTRICTS' ADVANTAGES OVER PARENTS AND THE HISTORY OF DISCRIMINATION AGAINST CHILDREN WITH DISABILITIES 7

A. Placing The Burden Of Proof On School Districts Lessens Structural Advantages That School Districts Have Over The Vast Majority Of Parents 9

1. Parents of children with disabilities vary significantly in the resources they can muster to navigate successfully the often adversarial procedures established by the IDEA 9

2. School districts have multiple advantages over parents at IEP meetings and at due process hearings 13

B. Placing The Burden Of Proof On School Districts Furthers The IDEA's Purpose Of Combating Historic Patterns Of Unconstitutional Treatment Of Children With Disabilities 18

TABLE OF CONTENTS – Continued

Page

C. Placing The Burden Of Proof On School Districts Encourages Them To Act Consistently With The Interests Of Children With Disabilities And Society 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

In re Arons, 756 A.2d 867 (Del. 2000), *cert. denied*, 532 U.S. 1065 (2001) 17

Association for Disabled Americans, Inc. v. Florida Int'l Univ., ___ F.3d ___, 2005 WL 768129 (11th Cir. Apr. 6, 2005) 23

Board of Educ. v. Rowley, 458 U.S. 176 (1982) ..... *passim*

Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) 23

Concrete Pipe & Prods. of Cal. Inc. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993) 16

Deal v. Hamilton County Bd. of Educ., 392 F.3d 840 (6th Cir. 2004) 27

Georgia v. United States, 411 U.S. 526 (1973) 25

International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) 25

JH v. Henrico County Sch. Bd., 395 F.3d 185 (4th Cir. 2005) 29

Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) 6, 24

Lavine v. Milne, 424 U.S. 577 (1976) 25

Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972) 20, 24

O'Neal v. McAninch, 513 U.S. 432 (1995) 4, 16

Oberti v. Board of Educ., 995 F.2d 1204 (3d Cir. 1993) 15

TABLE OF AUTHORITIES – Continued

Page

Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) 20

Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972) 20

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) 5, 19

Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989) 28

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 5, 19

[Redacted] v. Baltimore City Pub. Sch., OAH No. MSDE-CITY-OT-200200192 (June 26, 2002) 17

S-1 v. Turlington, 635 F.2d 342 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981) 14

School Comm. of Burlington v. Department of Educ., 471 U.S. 359 (1985) 12

Smith v. Robinson, 468 U.S. 992 (1984) 5, 22

State ex rel. Beattie v. Board of Educ., 172 N.W. 153 (Wis. 1919) 19

Tennessee v. Lane, 124 S. Ct. 1978 (2004) 19, 22, 23

Tinker v. Midland Valley Mercantile Co., 231 U.S. 681 (1914) 3, 9, 18, 19

Town of Burlington v. Department of Educ., 736 F.2d 773 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985) 29

In re Winship, 397 U.S. 358 (1970) 30

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const., amend XIV, § 1 (Equal Protection Clause) 21

Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(3) 5, 22

Pub. L. No. 94-142, § 3(a), 89 Stat. 775 (1975) 5, 20

Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*
§ 1400(c)(2) 19
§ 1400(c)(6) 5, 20
§ 1400(d)(1) 29
§ 1412(a)(6)(A) 24
§ 1412(a)(11)(A)(ii) 24
§ 1415(b)(1) 15
§ 1415(f)(2)(A) 15
§ 1415(h)(1) 17
§ 1415(l) 22

Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, Sec. 101,
§ 602(11) 13
§ 612(a)(3)(A) 13
§ 612(a)(11)(A)(iii) 13
§ 615(b)(2)(A)(ii) 13
§ 615(b)(7)(A)(ii) 13

McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11431 *et seq.* 3

Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) 25

Voting Rights Act, 42 U.S.C. § 1973c (Section 5) 25

TABLE OF AUTHORITIES – Continued

Page

34 C.F.R. § 300.501(a)(1) 15
34 C.F.R. § 300.509 16
34 C.F.R. § 300.562(b)(2) 15
19 T.A.C. § 89.1185(d) 16

LEGISLATIVE HISTORY

121 Cong. Rec. 37,416 (1975) 29
143 Cong. Rec. (1997)
7864 20
7918 21
7921 21
7925 21
7929 21
8187 21
150 Cong. Rec. (daily ed. May 12, 2004)
S5326 22
S5344 29
S5351 ..... 9, 16
S5353 ..... 12, 13, 22
150 Cong. Rec. (daily ed. May 13, 2004)
S5402 22
S5408 ..... 19, 20
H.R. Rep. No. 94-332 (1975) 19, 20, 22
H.R. Rep. No. 101-485 (1989) 23
S. Rep. No. 94-168 (1975) 20, 29
S. Rep. No. 101-116 (1989) 23
S. Rep. No. 104-275 (1996) 21

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Better Homes Fund, *Homeless Children: America's New Outcasts* (1999) 12
Brief for United States as *Amicus Curiae*, *Schaffer v. Vance*, No. 00-1471 (4th Cir.) 8, 14
M. Burgdorf & R. Burgdorf, Jr., *A History of Unequal Treatment*, 15 Santa Clara Lawyer 855 (1975) 20
M. Burt *et al.*, *Helping America's Homeless* (2001) 12
D. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 Duke L.J. 166 14
P. Garriott *et al.*, *Teachers as Parents, Parents as Children: What's Wrong With This Picture?*, 45 Preventing School Failure 37 (Fall 2000) 14
General Accounting Office, GAO No. 03-897, *Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts* (Sept. 2003) 26, 27
S. Goldberg & P. Kuriloff, *Evaluating the Fairness of Special Education Hearings*, 57 Exceptional Children 546 (1991) 15
T. Hehir, *The Impact of Due Process on the Programmatic Decisions of Special Education Directors*, Special Educ. Leadership Rev. 63 (Spring 1992) 27
T. Hehir, *The Impact of Due Process on the Programmatic Decisions of Special Education Directors* (Ed. D. Thesis, Harvard University 1990) 14, 26, 28

TABLE OF AUTHORITIES – Continued

Page

J. Jacobson *et al.*, *Cost-Benefit Estimates for Early Intensive Behavioral Intervention for Young Children With Autism*, 13 Behavioral Interventions 201 (1998) 29

J. Johnston, *Bayesian Fact-Finding and Efficiency: Toward an Economic Theory of Liability under Uncertainty*, 61 S. Cal. L. Rev. 137 (1987) 26

K. Kortenkamp & J. Ehrle, The Urban Institute, *New Federalism National Survey of America's Families: The Well-Being of Children Involved with the Child Welfare System* (2002) 13

P. Kuriloff & S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 Harv. Negot. L. Rev. 35 (1997) 18

T. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 BYU L. Rev. 1 30

National Council on Disability, *Improving the Implementation of the Individuals with Disabilities Education Act: Making Schools Work for All of America's Children* (1995) 15

National Dissemination Center for Children with Disabilities, *Who Are the Children in Special Education?* (July 2003) 11

D. Neal & D. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 Law & Contemp. Probs. 63 (1985) 26

Office of Elementary & Secondary Educ., U.S. Dep't of Educ., *Report to Congress: Education for Homeless Children and Youth Program: Fiscal Year 2000* 12

TABLE OF AUTHORITIES – Continued

Page

Office of Special Education Programs, U.S. Dep't of Educ., *Special Education Elementary Longitudinal Study (SEELS): The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households* (Sept. 2002) 11, 12

President's Commission on Excellence in Special Education, *A New Era: Revitalizing Special Education for Children and Their Families* (2002) 23

G. Schultz & J. McKinney, *Special Education Due Process: Hearing Officer Background and Case Variable Effects on Decisions Outcomes*, 2000 B.Y.U. Educ. & L.J. 17 16

U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983) 23

C. van Wingerden *et al.*, *Education Issue Brief: Improving Special Education for Children with Disabilities in Foster Care* (Casey Family Programs 2002) 13

M. Wagner *et al.*, *The Individual and Household Characteristics of Youth With Disabilities: A Report from the National Longitudinal Transition Study-2 (NLTS-2)* (2003) 11, 12, 13

INTEREST OF *AMICI CURIAE*

Amici curiae advocate on behalf of children with disabilities, including children with disabilities coming from poor or homeless families, to ensure that they receive the free appropriate public education they are guaranteed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*[1]

The Arc of the United States is a national organization of and for people with mental retardation and related developmental disabilities and their families. The Arc was founded in 1950 by a small group of parents and other concerned individuals with the primary purpose of procuring services for children who were denied an education by public schools. The Arc today is a grassroots organization with 140,000 members who are affiliated through approximately 1,000 state and local chapters across the nation. The Arc works to ensure that the estimated 7.2 million Americans with mental retardation and related developmental disabilities have the services and supports they need to grow, develop, and live in communities across the nation. These services include early intervention, health care, a free appropriate public education, and supports for their families.

The *Autism Society of America* (ASA) is a national organization dedicated to increasing public awareness about autism and the day-to-day issues faced by individuals with autism and their families, and advocating for programs and services for the autism community. ASA began 40 years ago with the vision of one father, Bernard Rimland, Ph.D., and the help of a handful of parents of

---

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

autistic children. One of the small group was Ruth Sullivan, who was a driving force behind the enactment of the IDEA's predecessor in 1975. ASA currently consists of more than 50,000 members and supporters connected through a network of 200 chapters nationwide. Over the last four decades, ASA has been responsible, in part or in whole, for the introduction of many pieces of major legislation involving the education of children with disabilities.

The *Epilepsy Foundation* is a nonprofit corporation founded in 1968 to advance the interests of 2.5 million Americans with epilepsy and seizure disorders. With its affiliates throughout the nation, the Epilepsy Foundation maintains and disseminates information about epilepsy and seizures; promotes public understanding of the disorder; and supports research, professional awareness and advocacy on behalf of people with seizure disorders. Because the term "epilepsy" evokes stereotyped images and fears in others that affect persons with this medical condition in all aspects of life, the Epilepsy Foundation has worked to dispel the stigma associated with seizures, and has supported the development of laws, including the IDEA, that protect individuals from discrimination based on these stereotypes and fears.

NAMI, with more than 220,000 members and 1,200 state and local affiliate organizations, is the Nation's voice on mental illness and the leading grassroots advocacy organization dedicated to improving the lives of children, adolescents, and adults living with mental illnesses. NAMI members include mental health consumers, family members, professionals, and other advocates. NAMI works across our nation to ensure that children and adults with mental illnesses receive appropriate treatment and services, including educational services under the IDEA, that allow them ultimately to lead independent and productive lives.

United Cerebral Palsy (UCP) is one of the largest national charitable organizations focusing on people with disabilities and their families. Since its inception more than fifty years ago, UCP has actively participated in

formulating policy to ensure the rights and full inclusion of people with all disabilities. Given that such inclusion for children and youth with disabilities largely depends on their individual access to a free appropriate public education, the effort to ensure that this access is consistently upheld is one of UCP's highest priorities.

The *National Law Center on Homelessness & Poverty* (NLCHP) serves as the legal arm of the nationwide movement to prevent and end homelessness. NLCHP, established in 1989, seeks to protect the education rights of homeless children by enforcing the McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11431 *et seq.*, a federal law that provides a wide array of educational rights to children and youth in homeless situations. NLCHP worked to ensure that, when the IDEA was reauthorized in 2004, provisions were added to address the special needs of children with disabilities who also experience homelessness.

SUMMARY OF ARGUMENT

A. In determining the appropriate party to bear the burden of proof where the statute does not expressly so provide, this Court assesses "the relative position of the parties" as one critical factor, and places the burden of proof on the party that "occupie[s] the position of advantage." *Tinker v. Midland Valley Mercantile Co.*, 231 U.S. 681, 682-683 (1914) (Holmes, J.). In determining where the burden of proof should lie in due process hearings under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, this Court must consider the entire spectrum of parents of children with disabilities and the resources they are able to muster to participate in the procedures established by the IDEA, not simply the facts of this case.

Although there is great variation, parents of children with disabilities are more likely to have characteristics that make it more difficult to navigate successfully the often adversarial procedures established by the IDEA. Parents of children with disabilities tend to be less educated than

parents of students in the general population. A substantial portion of children with disabilities come from economic and social circumstances – including, *in extremis*, poverty and homelessness – more adverse than other children and that are likely to limit the parents' opportunity to participate fully in the process to develop an Individualized Education Program (IEP) for their child. Some children with disabilities must rely on foster parents or other surrogates, instead of their parents, to advocate on their behalf.

School districts hold significant advantages over parents in developing an IEP and at any ensuing due process hearings. Many parents enter the process of developing an IEP ignorant of their rights and intimidated by the process. Further, school districts generally have information not available to parents that is relevant in developing an IEP. Information regarding the likelihood that a school district's proposed IEP has worked (or not worked) in the past for other children, for example, is uniquely available to that school district.

The burden of proof dictates the structure of the proceeding, determining who must present their evidence first. *See O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). Inexperienced parents, often unrepresented by counsel, are at a substantial disadvantage at due process hearings if they have to present their "case" first, not understanding what is expected of them and lacking the opportunity to model their presentation on that of the school district's representative. By contrast, the school district is normally represented by an attorney, a repeat player familiar with the formal and informal rules surrounding such proceedings. School districts can also rely on existing school employees (such as counselors, social workers, and nurses) to testify at the hearings as experts in support of the proposed IEP. For many children who are entitled under the IDEA to a free appropriate public education, the required ardor of the parents is necessarily outweighed by a lack of resources necessary to engage school districts.

Placing the burden of proof on school districts will provide a needed counterweight for these families and thus ensure that the burden of proof is on the party that occupies the position of advantage.

B. Other important factors in determining which party should bear the burden of proof are "the policies behind the statute," along with "evidentiary probabilities" of whether the challenged action was incorrect. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 267 (1989) (O'Connor, J., concurring in judgment). Moreover, when constitutional rights are involved, the burden of proof must be calibrated to ensure that imperfect information does not result in constitutional violations. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). These factors also support placing the burden of proof on school districts, many of which were responsible for subjecting millions of children with disabilities to blatant and unconstitutional discrimination.

In enacting the IDEA's predecessor in 1975, Congress found that millions of children with disabilities were either excluded from or otherwise denied an appropriate public education. In light of federal courts declaring such practices unconstitutional, Congress enacted the IDEA "in order to assure equal protection of the law." Pub. L. No. 94-142, § 3(a), 89 Stat. 775 (1975). When Congress reauthorized the IDEA in 1997 and again in 2004, it retained this finding, *see* 20 U.S.C. § 1400(c)(6), and the legislative history is replete with statements that the IDEA was intended to vindicate the constitutional rights of children with disabilities. This Court has reached the same conclusion. *See Smith v. Robinson*, 468 U.S. 992, 1013 (1984). In enacting the Americans with Disabilities Act of 1990, Congress found that "discrimination against individuals with disabilities persists in such critical areas as * * * education," 42 U.S.C. § 12101(a)(3), a finding supported by that Act's legislative history, case law, and subsequent reports by independent governmental bodies.

The undisputed fact that millions of children with disabilities were unjustifiably and unconstitutionally denied

public educations for decades preceding the enactment of the IDEA warrants placing the burden of proof on school districts to show that they are currently in compliance with their constitutionally- and statutorily-mandated obligations. This was the rule adopted by this Court in cases involving racial desegregation at the time Congress first enacted the IDEA in 1975. *See Keyes v. School Dist. No. 1*, 413 U.S. 189, 208-209 (1973). If Congress had intended to deviate from such well-known precedent in enacting the IDEA and adopt a rule favoring school districts, it could have easily done so. To the contrary, Congress demonstrated special solicitude for children with disabilities in the IDEA by creating a statutory scheme imposing affirmative obligations on school districts. Because the IDEA was intended to constitute a remedial measure to redress a pattern of discrimination, its provisions should be read to place the burden of proof on school districts, as this Court has done under analogous statutes.

C. Placing the burden of proof on school districts will aid petitioners and other families in due process hearings by structuring the production of evidence in a manner more favorable to the children and granting the families the benefit of the doubt when the evidence is in equipoise.

Just as importantly, placing the burden of proof at the due process hearings on school districts will alter a school district's conduct as it drafts every IEP and meets with all parents. If a school district is aware that it will be required to show that its proposed education plan for the child meets the substantive requirements of the IDEA in any subsequent due process hearing, it will have a stronger incentive to work with the parent to reach the correct result in initially developing the IEP.

This procedural incentive is necessary to combat the strong competing incentives faced by school districts on the other side. Pressured by short-term budgetary concerns, school officials are often not willing to provide the appropriate special education and related services required by the IDEA. Holding that the burden of proof falls

on school districts, however, should not change the spending patterns by most school districts because most of them have been bearing the burden of proof for the past 30 years. Any increase in costs to school districts due to the burden of proof will be the result of school districts coming into compliance with their existing substantive obligations, a result about which they can hardly be heard to complain.

Society as a whole, in addition to the child with the disability, benefits if school districts comply with the IDEA because money spent today on special education will permit children with disabilities to become productive members of society instead of individuals reliant on government services. For certain disabilities, such as autism, if the proper special education is not provided at an early age, the window of opportunity for treating the disability may pass completely. Given the high individual and societal costs involved in denying a child – even temporarily – the appropriate public education to which he or she is entitled under the IDEA, the burden of proof properly is placed on school districts to avoid the risk of error and encourage compliance with the law.

ARGUMENT

PLACING THE BURDEN OF PROOF ON A SCHOOL DISTRICT AT A DUE PROCESS HEARING TO SHOW THAT IT IS PROVIDING A FREE APPROPRIATE PUBLIC EDUCATION TO A CHILD WITH A DISABILITY IS WARRANTED BY SCHOOL DISTRICTS' ADVANTAGES OVER PARENTS AND THE HISTORY OF DISCRIMINATION AGAINST CHILDREN WITH DISABILITIES

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, does not expressly provide which party should bear the burden to prove in an "impartial due process hearing" that a student with a

disability is receiving the free appropriate public education guaranteed by the statute. As respondents acknowledge (Br. in Opp. 18-20), however, virtually all of the States that have propounded their own statutes or regulations that expressly address the issue (some contemporaneous with the enactment of the IDEA's predecessor in 1975) have placed the burden of proof on school districts.

At the same time, a majority of the appellate courts to address this issue over the past 30 years have concluded that federal law compels the placement of the burden of proof on school districts. *See* Pet. Br. 18. It is also the position espoused by the United States Department of Education, as reflected in an *amicus* brief filed at an earlier stage of this very litigation. *See* Brief for United States as *Amicus Curiae*, *Schaffer v. Vance*, No. 00-1471 (4th Cir.).

This Court's cases have looked to a variety of factors in placing the burden of proof when the statute is silent on the matter. *Amici* focus in this brief on two factors that are critical to the proper apportionment of the burden under the IDEA. First, placing the burden of proof on school districts mitigates the structural advantages that school districts have in their interactions with most parents, particularly parents who lack the economic, social, and educational resources that are necessary to understand the complexities of their child's individualized education program and to participate in an adversarial administrative proceeding. Second, placing the burden of proof on school districts furthers Congress's intent to redress the unconstitutional discrimination, exclusion, and miseducation of children with disabilities.

Neither the court of appeals below nor respondents' brief in opposition to *certiorari* gives a reason to upend the well-established practice of placing the burden of proof on school districts. They offer no evidence, nor are we aware of any, that this practice is infeasible or has led to unjust results. To the contrary, placing the burden of proof on the parents would lead to fewer children with disabilities

receiving the appropriate education to which they are entitled under the IDEA because the risk of error would be borne by the children, and because school districts would have one less incentive for complying with the IDEA.

A. Placing The Burden Of Proof On School Districts Lessens Structural Advantages That School Districts Have Over The Vast Majority Of Parents

In determining the appropriate party to bear the burden of proof, this Court assesses "the relative position of the parties," and places the burden of proof on the party that "occupie[s] the position of advantage." *Tinker v. Midland Valley Mercantile Co.*, 231 U.S. 681, 682-683 (1914) (Holmes, J.). The relationship between school districts and parents of children with disabilities affords school districts multiple advantages at due process hearings and at earlier stages of the process. "It is parents who continue to be at a disadvantage when it comes to the IDEA." 150 Cong. Rec. S5351 (daily ed. May 12, 2004) (Sen. Kennedy).

1. Parents of children with disabilities vary significantly in the resources they can muster to navigate successfully the often adversarial procedures established by the IDEA

Parental participation in the IDEA process is critical to the development of an appropriate education for a child with a disability. As this Court explained in *Board of Education v. Rowley*, 458 U.S. 176 (1982), Congress recognized that the diversity of children with disabilities confounds one-size-fits-all approaches to providing the special education and related services necessary to ensure each child receives an appropriate education. *Id.* at 202. Thus, Congress adopted a series of procedural mechanisms to encourage school districts and parents, working with

experts, to develop jointly an Individualized Education Program (IEP) that grants "access to specialized instruction and related services which are individually designed to provide educational benefit" to each child with a disability. *Id.* at 201. Parents are an essential component of that process. "Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies, and in the formulation of the child's individual educational program." *Id.* at 208 (citation omitted).

While most "parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act," *id.* at 209, school districts hold certain structural advantages that make it difficult for many parents to engage in the "full participation" that Congress recognized would be necessary to reach the correct individualized program for each child, *see id.* at 206. As Judge Luttig noted below in dissent, the Fourth Circuit panel's placement of the burden of proof on the parents may have been influenced by the resources and expertise evidenced by the committed parents in this case that may have made it seem as if neither party held a distinct advantage. Pet. App. 20. But the burden of proof for all due process hearings cannot be determined based on the characteristics of these particular parents.

Instead, in determining where the burden of proof should lie, this Court must consider the entire spectrum of parents of children with disabilities and the resources they are able to muster to participate in the procedures established by the IDEA. Although there is great variation, parents of children with disabilities are more likely to have characteristics that make it more difficult to navigate successfully the often adversarial procedures established by the IDEA. Many of the problems discussed below are faced by significant numbers of parents, in varying degrees, from all walks of life.

a. Parents of children with disabilities tend to be less educated than parents of students in the general population. They are 50 percent more likely to have only a high school education or less, and almost twice as likely to have not completed high school at all. Their college graduation rate is two-thirds that of other parents. *See* Office of Special Education Programs, U.S. Dep't of Educ., *Special Education Elementary Longitudinal Study (SEELS): The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households* 23-24 (Sept. 2002).

b. A substantial portion of children with disabilities come from economic and social circumstances that are likely to limit the parents' opportunity to participate fully in the IDEA processes. "[C]hildren and youth with disabilities are more often affected by poverty." National Dissemination Center for Children with Disabilities, *Who Are the Children in Special Education*? 6 (July 2003). Indeed, almost one quarter of children with disabilities are living in poverty, compared with 16 percent of children in the general population. *See ibid.* Parents of children with disabilities are 67 percent more likely to be unemployed. *See* M. Wagner *et al.*, *The Individual and Household Characteristics of Youth With Disabilities: A Report from the National Longitudinal Transition Study-2 (NLTS-2)* at 3-4 (2003).

Even middle-income parents of children with disabilities face barriers in pressing for the appropriate education that the IDEA guarantees their child. Over 65 percent of children with disabilities live in households with incomes less than $50,000, compared to only 45 percent of nondisabled children. *See NLTS-2*, *supra*, at 3-5. At least 12 percent of families with children with disabilities with incomes below $50,000 lack adequate transportation and/or telephone service which would enable them to advocate effectively for their children. *See SEELS*, *supra*, at 35. Almost 10 percent of such families lack health insurance coverage and are not covered by Medicaid, which could

cover some of the independent evaluations that may be needed to provide evidence to challenge a school's proposed education plan. *See SEELS, supra*, at 35; *NLTS-2, supra*, at ES-2. Such parents would be particularly hard pressed to advance the money necessary to provide the special education that their child needs during the pendency of any due process hearing and judicial appeals. *See School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 370 (1985) (noting that this option is available to "conscientious parents who have adequate means" and that they can recover reimbursement only if they ultimately prevail). Their need for the IEP to reach the correct result in the first instance is thus especially strong.

c. Poverty is not the only problem encountered by parents seeking to advocate on behalf of their children with disabilities. The States report that there are approximately one million homeless children and youth, 87 percent of whom are enrolled in school, and 77 percent of whom attend school regularly. *See* Office of Elementary & Secondary Educ., U.S. Dep't of Educ., *Report to Congress: Education for Homeless Children and Youth Program: Fiscal Year 2000* at 5. In addition to poverty, other characteristics associated with homelessness, such as being a single parent or suffering from illness, are likely to further impair the ability of homeless parents to advocate on behalf of their children. *See* Better Homes Fund, *Homeless Children: America's New Outcasts* 15-16 (1999); M. Burt *et al.*, *Helping America's Homeless* 58-59, 103-104 (2001). These same circumstances occur in families at every income level, and likewise impose barriers to full participation as advocates for their children. For example, children with disabilities are more likely to live in one parent households (37 percent, compared to 27 percent for the general population). *See NLTS-2, supra*, at 3-1.

Half the States reported that students in homeless situations had difficulties accessing special education programs. *See Report to Congress, supra,* at 7-8; 150 Cong. Rec. S5353 (daily ed. May 12, 2004) (Sen. Murray). In

reauthorizing the IDEA in 2004, Congress acknowledged these facts, *see id.* at S5353-S5355, and made special provisions to address some of the special needs of children experiencing homelessness. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, Sec. 101, §§ 602(11), 612(a)(3)(A), 612(a)(11)(A)(iii), 615(b)(2)(A)(ii), 615(b)(7)(A)(ii). Nonetheless, the reality is that a homeless parent is going to have, on average, less ability to advocate on behalf of his or her child at an IEP meeting or a due process hearing.

d. Some children must rely on foster parents or other surrogates to advocate on their behalf. Children with disabilities are twice as likely as other children to live with someone other than a biological parent. *See NLTS-2, supra*, at 3-1. There are nearly 500,000 children in foster care, thirty percent of whom are in special education. *See* 150 Cong. Rec. S5353 (daily ed. May 12, 2004) (Sen. Murray). Foster children with disabilities face special barriers when attempting to access special education because they are often placed in homes similar to those they were removed from – high-risk home environments characterized by poverty, instability, and adults with poor psychological well-being. *See* K. Kortenkamp & J. Ehrle, The Urban Institute, *New Federalism National Survey of America's Families: The Well-Being of Children Involved with the Child Welfare System* 4-5 (2002). These children, removed from abusive or neglectful situations, end up placed with adults not well-equipped to navigate through the special education process on their behalf. *See* C. van Wingerden *et al.*, *Education Issue Brief: Improving Special Education for Children with Disabilities in Foster Care* 3 (Casey Family Programs 2002).

2. School districts have multiple advantages over parents at IEP meetings and at due process hearings

Studies over the past 30 years have documented that school districts hold significant advantages over parents in

the process for developing the IEP and at any ensuing due process hearings. These advantages demonstrate the need for the burden of proof to be on school districts to show, at any due process hearing, that the IEP developed is appropriate.

a. Many parents enter the process of developing an IEP ignorant of their rights and intimidated by the process. One study, credited by the United States Department of Education in its *amicus* brief below, "revealed that most of the parents were not aware of their rights and, consequently, failed to take advantage of the procedural safeguards provided in the statute." Brief for United States as *Amicus Curiae*, *supra*, at 16 (citing D. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 Duke L.J. 166). In another comprehensive survey by Thomas Hehir, who later became the Director of the Office of Special Education Programs at the U.S. Department of Education, special education directors reported that parents find the information they receive about their rights to be "confusing." T. Hehir, *The Impact of Due Process on the Programmatic Decisions of Special Education Directors* 50 (Ed. D. Thesis, Harvard University 1990); *cf. S-1 v. Turlington*, 635 F.2d 342, 349 (5th Cir.) ("in most cases, the handicapped students and their parents lack the wherewithal either to know or to assert their rights under the [IDEA] and section 504"), *cert. denied*, 454 U.S. 1030 (1981).

Additionally, large percentages of parents feel "devalued, disrespected, and ostracized from the planning process." P. Garriott *et al.*, *Teachers as Parents, Parents as Children: What's Wrong With This Picture?*, 45 Preventing School Failure 37, 42 (Fall 2000). After conducting extensive hearings, the National Council on Disability, an independent federal agency, likewise reported that "[a]t every hearing [held by the Council], witness after witness testified that the IEP process is extremely frustrating, often intimidating, and hardly ever conducive to making

them feel that they were equal partners with professionals." National Council on Disability, *Improving the Implementation of the Individuals with Disabilities Education Act: Making Schools Work for All of America's Children* 57 (1995).

b. School districts generally will have information not available to parents that is relevant in developing an IEP and at any subsequent due process hearings. "In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to the relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise than the parents." *Oberti v. Board of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993).

While the IDEA nominally requires school districts to share with parents certain information they have about the child at issue, *see* 20 U.S.C. § 1415(f)(2)(A), only 24 percent of parents responding to a survey reported that all or nearly all records requested were made available, while 24 percent reported that no records were provided, and over half of parents reported that the school provided no explanation of whatever records were provided. *See* S. Goldberg & P. Kuriloff, *Evaluating the Fairness of Special Education Hearings*, 57 Exceptional Children 546, 550 (1991). Moreover, even though the statute requires school districts to permit parents to inspect and review a child's educational records, *see* 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(a)(1), they are not required to provide a *copy* of such records to parents unless circumstances prevent the parent from reviewing the records, *see* 34 C.F.R. § 300.562(b)(2).

But even if a school district complies with these requirements, it alone normally possesses information regarding the available education programs and services in that district and their efficacy for children confronting similar problems, or even the qualifications of the relevant teachers and staff. No formal discovery of this information

is available at any stage of the administrative process under federal law. *See* 34 C.F.R. § 300.509. Thus, information regarding the likelihood that a school district's proposed IEP has worked (or not worked) in the past for other children is uniquely available to that school district. It is "entirely sensible" to place "on the party more likely to have information relevant to the facts * * * the obligation to demonstrate [the] facts." *Concrete Pipe & Prods. of Cal. Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 626 (1993).

c. The burden of proof dictates the structure of the proceeding, determining who must present their evidence first. *See O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) (courts determine who has the burden "to help control the presentation of evidence at trial"). Unrepresented and inexperienced parents are at a disadvantage if they have to present their "case" first, not understanding what is expected of them and lacking the opportunity to model their presentation on that of the school district's experienced representative.

In some due process hearings, the hearing officer employs formal rules of evidence, such as excluding hearsay, that can be particularly difficult for lay persons to grasp and comply with. *See, e.g.*, 19 T.A.C. § 89.1185(d) (due process hearings follow Texas Rules of Evidence). Similarly, the substantive requirements of the IDEA are the type of specialized knowledge that school districts and their attorneys are more likely to possess. *See* G. Schultz & J. McKinney, *Special Education Due Process: Hearing Officer Background and Case Variable Effects on Decisions Outcomes*, 2000 B.Y.U. Educ. & L.J. 17, 29 ("Special education law is a highly complex legal area and parents win more cases when represented by an individual with legal knowledge.").

Most parents who request an impartial due process hearing will be unrepresented by counsel and will not have participated in such a hearing before. *See* 150 Cong. Rec. S5351 (daily ed. May 12, 2004) (Sen. Kennedy) ("Most parents don't have access to any attorney, or must rely on

low-cost legal aid. And data from surveys shows that even this help is in short supply."). By contrast, the school district is normally represented by an attorney, a repeat player familiar with the formal and informal rules surrounding such proceedings. *See ibid.* ("Those parents who have the courage to go it alone face schools that are well represented. State data shows that in 2003 schools were much more likely to bring an attorney to a hearing than parents were.").[2] While the law allows non-attorney advocates to accompany and advise parents, *see* 20 U.S.C. § 1415(h)(1), some States do not permit such advocates to represent parents at hearings. *See, e.g., In re Arons*, 756 A.2d 867 (Del. 2000), *cert. denied*, 532 U.S. 1065 (2001).

An alarming illustration of the interaction of these school district advantages with the burden of proof is *[Redacted] v. Baltimore City Public Schools*, OAH No. MSDE-CITY-OT-200200192 (June 26, 2002), available at www.msde.state.md.us/SpecialEducation/hearing_decisions2002/02-H-CITY-192.pdf, in which the sibling-guardian of a high school student initiated a due process hearing *pro se* because she claimed her brother, who was determined to be a child with a disability eligible for special education, was not receiving any remedial classes despite the fact that he had failed the 11th grade, and that he still lacked basic living skills, such as how to read, count money, and fill out a job application. At the hearing, she attempted to introduce nine exhibits (described as summaries/reports), but the school district's attorney succeeded in excluding them under the evidentiary rules. Commenting on her lack of legal sophistication, the hearing officer faulted the guardian for failing to submit into evidence the IEP, or the assessments or evaluations of the child made by the school

[2] For example, in Illinois, 95 percent of school districts but only 35 percent of parents were represented by attorneys at due process hearings. *See ibid.* Similarly, in New York, school districts used attorneys in every due process hearing, while parents had counsel at less than a third of the hearings. *See ibid.*

district. Although the school district undoubtedly possessed all evidence that might have been necessary to determine whether its educational plan for this child was appropriate under the law and whether the plan was being complied with, the school district's attorney took advantage of the burden of proof rule and offered no witnesses and no documents. In this state of equipoise, without evidence from either side, the hearing officer granted a summary decision for the school district. Congress could not have intended due process hearings to become venues for such gamesmanship.

d. Finally, school districts can rely on existing school employees (such as counselors, social workers, and nurses) to testify at the hearings as experts in support of the proposed IEP. The parents, by contrast, if they desire experts to appear to support their position, must pay for them themselves, thus further disadvantaging middle- and low-income families. "School administrators can call on many more experts in developing their arguments than can the average parent." P. Kuriloff & S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 Harv. Negot. L. Rev. 35, 62 (1997).

Thus, for many children who are entitled under the IDEA to a free appropriate public education, the required ardor of the parents is necessarily outweighed by a lack of resources necessary to engage school districts. Placing the burden of proof on school districts will provide a needed counterweight for these families and thus ensure that the burden of proof is on the party that "occupie[s] the position of advantage." *Tinker*, 231 U.S. at 682.

B. Placing The Burden Of Proof On School Districts Furthers The IDEA's Purpose Of Combating Historic Patterns Of Unconstitutional Treatment Of Children With Disabilities

Other important factors in determining which party should bear the burden of proof are "the policies behind

the statute," along with "evidentiary probabilities" of whether the challenged action was incorrect. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 267 (1989) (O'Connor, J., concurring in judgment); *see also Tinker*, 231 U.S. at 682-683. Moreover, when constitutional rights are involved, the burden of proof must be calibrated to ensure that imperfect information does not result in constitutional violations. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). These factors also support placing the burden of proof on school districts, many of which were responsible for subjecting millions of children with disabilities to blatant and unconstitutional discrimination.

1. a. In enacting the IDEA's predecessor in 1975, Congress found that one million children were "excluded entirely from the public school system" because of their disabilities. 20 U.S.C. § 1400(c)(2)(C). Laws "prohibiting certain individuals with disabilities * * * from attending public schools" were part of a broader pattern of exclusion of people with disabilities from public life. *Tennessee v. Lane*, 124 S. Ct. 1978, 1995 (2004) (Souter, J., concurring). Exclusion of a child with cerebral palsy from public school, for example, "was judicially sustained in part as a justified precaution against the very sight of a child with cerebral palsy, lest he 'produc[e] a depressing and nauseating effect' upon others." *Ibid.* (quoting *State ex rel. Beattie v. Board of Educ.*, 172 N.W. 153 (Wis. 1919)).

In addition, substantial numbers of children with disabilities were given permission to enter the schoolhouse, but were learning nothing because schools failed to account for their disabilities. *See* 20 U.S.C. § 1400(c)(2)(B) & (D). "[M]illions of handicapped children 'were * * * sitting idly in regular classrooms awaiting the time when they were old enough to "drop out."'" *Rowley*, 458 U.S. at 191 (quoting H.R. Rep. No. 94-332, at 2 (1975)). Thus, "[i]n the 1970s schools in America educated only one in five students with disabilities." 150 Cong. Rec. S5408 (daily ed. May 13, 2004) (Sen. Bingaman).

As explained in *Rowley*, the impetus for the IDEA included two landmark federal cases establishing that the States' failure to provide children a public education appropriate to their needs was a violation of the Constitution. *See* 458 U.S. at 180 n.2, 192-200 (discussing *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972), and *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (E.D. Pa. 1972)). Indeed, when Congress enacted the IDEA, children were winning similar suits across the nation. *See* M. Burgdorf & R. Burgdorf, Jr., *A History of Unequal Treatment*, 15 Santa Clara Lawyer 855, 878 & n.136 (1975); 143 Cong. Rec. 7864 (1997) (Sen. Jeffords) (when the IDEA was originally enacted, there were "26 State cases where it was determined that there was a constitutional right for an appropriate education."). "Parents * * * began asserting their children's rights to attend public schools, using the same equal protection arguments used on behalf of the African American children in *Brown*: the 14th amendment of the U.S. Constitution guarantees their children equal protection under the law." 150 Cong. Rec. S5408 (daily ed. May 13, 2004) (Sen. Bingaman).

Thus, in enacting the IDEA and providing federal funds to States to educate children with disabilities, Congress declared that its intent was to "assist State and local efforts to provide programs to meet the educational needs of handicapped children *in order to assure equal protection of the law*." Pub. L. No. 94-142, § 3(a), 89 Stat. 775 (1975) (emphasis added); *see also* S. Rep. No. 94-168, at 13, 22 (1975); H.R. Rep. No. 94-332, at 14 (1975); *Rowley*, 458 U.S. at 198 & n.22.

b. When Congress reauthorized the IDEA in 1997 and again in 2004, it retained this finding linking the statute to the Equal Protection Clause. *See* 20 U.S.C. § 1400(c)(6).

In reauthorizing the IDEA in 1997, Congress explained that it wished "to restate that the 'right to equal educational opportunities' is inherent in the equal protection clause of

the 14th Amendment to the U.S. Constitution." S. Rep. No. 104-275, at 31 (1996); *see also id.* at 25 ("The IDEA is founded in and secured by the 14th Amendment of the Constitution."). As Senator Frist explained: "It was very clear that IDEA * * * was enacted to establish a consistent policy that people could read and understand for States and school districts to comply with. With what? The equal protection clause under the 14th amendment of the U.S. Constitution. * * * Again, it was very clear [that the IDEA was based on] * * * two landmark decisions * * * in 1972 which established the constitutional rights – not a mandate, the constitutional rights – for individuals with disabilities to receive a free, appropriate public education." 143 Cong. Rec. 7929 (1997).

This understanding of the IDEA was often reiterated during the 1997 reauthorization debates. *See, e.g., id.* at 7918 (Sen. Thomas) ("IDEA helps local schools meet their constitutional responsibilities to educate everyone"); *id.* at 7921 (Sen. Jeffords) ("This is a constitutional matter – a matter of equal protection."); *id.* at 7925 (Sen. Harkin) ("It is a civil rights bill, it is a law implementing the equal protection clause of the 14th Amendment to the U.S. Constitution."); *id.* at 8187 (Sen. Lott) ("The obligation to provide children with disabilities a free and appropriate education is grounded in the 14th amendment to the Constitution * * * .").

Similarly, in reauthorizing the IDEA again in 2004, members of Congress confirmed that the IDEA was intended to vindicate children's constitutional rights. As Senator Harkin explained:

> In 1975, Congress wrote IDEA for two reasons. First, we fleshed out the substance and details of what was required to achieve equality for children with disabilities. Congress specified critical protections for parents and children to transform the constitutional requirement into a practical reality throughout the country. * * * A second important purpose of IDEA was [to provide

funds] to help States meet their constitutional obligations.

150 Cong. Rec. S5326 (daily ed. May 12, 2004); *see also id.* at S5353 (Sen. Murray) (IDEA "is based on the American principle of equal opportunity. IDEA recognizes that students have a civil right to a free, appropriate public education even if they have special needs that require additional resources."); *id.* at S5402 (daily ed. May 13, 2004) (Sen. Daschle) ("IDEA is more than simply an education program; it is one of our Nation's most important civil rights programs."); *id.* at S5408 (Sen. Bingaman) ("Recognizing the Constitution's guarantee of equal protection under the law, Congress created the statutory right to a free appropriate public education in the least restrictive environment.").

It is because of the close relationship between the IDEA and the Constitution that this Court held in *Smith v. Robinson*, 468 U.S. 992 (1984), that the IDEA precluded children with disabilities from bringing claims against school districts based on the Equal Protection Clause. The Court reasoned that Congress intended the IDEA to be the statutory "vehicle for protecting the constitutional right of a handicapped child to a public education." *Id.* at 1013.[3]

2. The same discriminatory conditions that impelled Congress to enact the IDEA continue to exist. After "decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities," by the Executive and Legislative branches, *Lane*, 124 S. Ct. at 1984, Congress found in enacting the Americans with Disabilities Act of 1990 that "discrimination against individuals with disabilities *persists* in such critical areas as * * * education." 42 U.S.C. § 12101(a)(3) (emphasis added).

[3] Congress subsequently amended the IDEA to make clear that it did not intend for the IDEA to be the *exclusive* remedy for constitutional violations. *See* 20 U.S.C. § 1415(l).

This finding of persistent education discrimination is supported by testimony credited by both houses of Congress about exclusion of people with disabilities from education. *See* S. Rep. No. 101-116, at 7 (1989); H.R. Rep. No. 101-485, pt. 2, at 29 (1990). This Court in *Lane* also relied on "a special task force" created by Congress "that gathered evidence from every State in the Union," including "hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions." 124 S. Ct. at 1984, 1990 (citing *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 391-424 (2001) (App. C to opinion of Breyer, J., dissenting)). Those examples include numerous modern instances of children with disabilities being discriminated against by public schools. This Court found that "[t]he decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including * * * public education." *Lane*, 124 S. Ct. at 1989; *see also Association for Disabled Americans, Inc. v. Florida Int'l Univ.*, ___ F.3d ___, 2005 WL 768129 (11th Cir. Apr. 6, 2005) (holding that Disabilities Act constitutionally abrogates States' sovereign immunity to suits involving public education).

Congress's finding of persistent discrimination in education is consistent with the conclusion of the United States Commission on Civil Rights that tens of thousands of children with disabilities "continue to be excluded from the public schools, and others are placed in inappropriate programs." U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 28 & n.77 (1983); *see also* President's Commission on Excellence in Special Education, *A New Era: Revitalizing Special Education for Children and Their Families* 39-40 (2002) ("[T]here are children with disabilities who are still segregated simply because their disability creates difficulties in providing integrated educational experiences. Members of this Commission viewed situations where children with severe disabilities were separated – for no apparent justifiable educational purpose – from the

regular school building and consigned to secondary settings because of their disability.").

3. The undisputed fact that millions of children with disabilities were unjustifiably and unconstitutionally denied public educations for decades preceding the enactment of the IDEA warrants placing the burden of proof on school districts to show that they are currently in compliance with their constitutionally- and statutorily-mandated obligations. This was the rule adopted by this Court in cases involving racial desegregation at the time Congress first enacted the IDEA in 1975. *See Keyes v. School Dist. No. 1*, 413 U.S. 189, 208-209 (1973) ("[A]t that point where an intentionally segregative policy is practiced in a meaningful or significant segment of a school system, as in this case, * * * it is both fair and reasonable to require that the school authorities bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent."). Such a burden of proof is particularly appropriate under the IDEA, in which the due process procedures are one of the mechanisms the State education agency uses to meet *its* affirmative obligation to ensure that local school districts comply with the IDEA's requirements. *See* 20 U.S.C. §§ 1412(a)(6)(A), (a)(11)(A)(ii).

Placing the burden on the school district was also the approach adopted in *Mills*, 348 F. Supp. at 881, which served as Congress's template when enacting the IDEA "due process hearing" protections. *See Rowley*, 458 U.S. at 194 & n.16. Congress's textual silence in this context can only be understood to embrace these cases.

If Congress had intended to deviate from these well-known precedents in enacting the IDEA and adopt a rule favoring school districts, it could have easily done so. To the contrary, Congress demonstrated special solicitude for children with disabilities. Congress determined that the

discrimination against them was so entrenched that a simple prohibition on disability discrimination, such as that enacted in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, was not sufficient. Instead, Congress designed a statutory scheme that imposes affirmative obligations on States and local school districts that accept the federal funds targeted at special education.

In another such comprehensive civil rights statute that imposes affirmative obligations on State and local governments, it was settled at the time Congress enacted the IDEA's predecessor in 1975 that the burden of proof rests with the government. *See Georgia v. United States*, 411 U.S. 526, 538 (1973) (holding that Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which imposes a requirement that States with a substantial history of race discrimination preclear voting changes, places the burden of proof on the State). This Court has also placed the burden of proof on the defendant at the remedial phase of civil actions when plaintiffs have established a pattern and practice of discrimination. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977). Because the IDEA was likewise intended to constitute a remedial measure to redress a pattern of discrimination, its provisions should also be read to place the burden of proof on school districts.

C. Placing The Burden Of Proof On School Districts Encourages Them To Act Consistently With The Interests Of Children With Disabilities And Society

1. "Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application." *Lavine v. Milne*, 424 U.S. 577, 585 (1976). Thus, placing the burden of proof on school districts will

aid petitioners and other families in due process hearings by structuring the production of evidence in a manner more favorable to the children and granting the families the benefit of the doubt when the evidence is in equipoise.

2. In addition to affecting the outcome of hearings that are held, the burden of proof at the due process hearings will alter school districts' conduct as they draft every IEP and meet with all parents. Despite the comparatively tiny number of due process hearings held,[4] each due process decision has a "systemic or ripple effect" and "thus the influence of due process extended far beyond the few students whose parents chose to use it." Hehir, *Thesis*, *supra*, at 5, 7, 11.

If a school district is aware that it will be required to show that its proposed education plan for a child meets the substantive requirements of the IDEA in any subsequent due process hearing, it will have a stronger incentive to work with the parent to reach the correct result than if it knows that the parent will bear the burden in subsequent proceedings. "The prospect of a hearing and estimations of its likely outcome shape the behavior of the participants, both in the formulation of their basic relationships and in the way they handle their disputes. The 'shadow of the law' extends well beyond the formally affected parties." D. Neal & D. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 Law & Contemp. Probs. 63, 77 (1985); *see also* J. Johnston, *Bayesian Fact-Finding and Efficiency: Toward an Economic Theory of Liability under Uncertainty*, 61 S. Cal. L. Rev. 137, 137 (1987) ("the economic incentives created by the [substantive legal]

[4] Nationwide, for the six million IEPs generated each year, approximately 3000-3500 due process hearings are held. *See* General Accounting Office, GAO No. 03-897, *Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts* 1, 11-12 (Sept. 2003).

standard will depend upon the process of fault determination").

Placing the burden of proof on school districts thus will make them more open to considering the suggestions and proposals offered by the parents and more careful in developing the IEP. Even if the outcome does not change substantially, the knowledge that they will bear the burden of proof if a parent seeks a due process hearing creates greater incentives for school districts to clarify the benefits that their proposal will provide the child to avoid such subsequent proceedings.

This procedural incentive to provide an appropriate IEP is necessary to combat the strong competing incentives school districts often face on the other side. The first reaction of many school officials, pressured by short-term budgetary concerns, is to put a band aid on the most obvious needs of a child with disabilities and not address the underlying long-term issues as the IDEA requires. These incentives result from enormous political pressure to keep costs down. As one special education director explained: "If something was to eliminate due process then economics would drive [senior school officials to say] forget it, let the kids go crazy. I think due process keeps the money intact to prevent that." T. Hehir, *The Impact of Due Process on the Programmatic Decisions of Special Education Directors*, Special Educ. Leadership Rev. 63, 72 (Spring 1992). "Left to its own devices, a school system is likely to choose the educational option that will help it balance its budget, even if the end result of the system's indifference to a child's individual potential is a greater expense to society as a whole." *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864-865 (6th Cir. 2004); *cf.* General Accounting Office, GAO No. 03-897, *Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts* 11-12 (Sept. 2003) (describing school officials' objections to "costly" or "expensive" educational services that led to due process hearings). Special education directors consistently

describe due process hearings as the "leverage" needed to counterbalance budgetary pressure and to protect the provision of special education. Hehir, *Thesis, supra*, at 71, 86-89, 100, 105.

Placing the burden of proof on school districts should not, however, change the spending patterns of most school districts because most of them have been bearing the burden of proof in due process hearings for the past 30 years. Thus, there will be no increased costs in those school districts. Any increase in costs to school districts due to the burden of proof, moreover, will be the result of school districts coming into compliance with their existing substantive obligations, a result about which they can hardly be heard to complain.

Placing the burden on school districts is unlikely to increase the total number of due process hearings. As noted above, most parents are, for a variety of reasons, relatively ignorant about their procedural rights under the IDEA. Thus, who bears the burden of proof (a relatively abstract concept for non-lawyers to begin with) is unlikely to alter their behavior one way or the other. By contrast, placing the burden of proof on school districts will continue to create the incentive to provide the free appropriate public education that they are obligated to provide.

3. Society as a whole benefits when school districts comply with the IDEA and provide the individualized educational and related services to which every child with a disability is entitled. "A chief selling point of the Act was that although it is penny dear, it is pound wise – the expensive individualized assistance early in life, geared toward teaching basic life skills and self-sufficiency, eventually redounds to the benefit of the public fisc as these children grow to become productive citizens." *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 181-182 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). For example, three years of intensive early intervention with a child with autism, at a total cost of $33,000 to

$60,000, has been estimated to save society between $187,000 to $203,000 by the time the child turns 21, and as much as $1,082,000 by age 55 because fewer government services and subsidies are required. *See* J. Jacobson *et al.*, *Cost-Benefit Estimates for Early Intensive Behavioral Intervention for Young Children With Autism*, 13 Behavioral Interventions 201, 212-214 (1998).

Congress's expectation when it first enacted the IDEA was that "[w]ith proper education services, many [individuals with disabilities] would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society." S. Rep. No. 94-168, at 9; *see also* 20 U.S.C. § 1400(d)(1)(A) (providing a free appropriate special education will "prepare them for employment and independent living"); *Rowley*, 458 U.S. at 201 n.23. By contrast, "[i]f families with kids with disabilities are not getting the [special education and] supportive services * * * then all of the promises of the Americans with Disabilities Act [are] for naught because these kids will not get the education they need that will give them equal opportunity, full participation, independent living, and economic self-sufficiency." 150 Cong. Rec. S5344 (daily ed. May 12, 2004) (Sen. Harkin).

Congress also recognized that delay in providing appropriate education to children with disabilities is "extremely detrimental" because it can "result in a substantial setback in the child's development." 121 Cong. Rec. 37,416 (1975) (Sen. Williams). For certain disabilities, such as autism or learning disabilities, if the proper special education is not provided at an early age, the window of opportunity for treating the disability may pass completely. *See, e.g.*, *JH v. Henrico County Sch. Bd.*, 395 F.3d 185, 190 (4th Cir. 2005); *Town of Burlington v. Department of Educ.*, 736 F.2d 773, 798 (1st Cir. 1984), *aff'd on other grounds*, 471 U.S. 359 (1985).

Due process hearings are thus not equivalent to simple civil actions about money, where society is generally indifferent as to which party bears the risk of error. *Cf. In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring). Given the high individual and societal costs involved in denying a child – even temporarily – the appropriate public education to which he or she is entitled under the IDEA, the burden of proof properly is placed on school districts to avoid the risk of error and encourage compliance with the law. *See* T. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 BYU L. Rev. 1, 21 ("Placing the burden of proof on a defendant may be justified on the ground that an erroneous decision in defendant's favor is more costly than an erroneous decision for plaintiff.").

CONCLUSION

For the reasons set forth above and in petitioners' brief, the judgment of the Fourth Circuit should be reversed and the case remanded for further proceedings.

Respectfully submitted,

DREW S. DAYS, III
Counsel of Record
SETH M. GALANTER
LINDA A. ARNSBARGER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
(202) 887-1500
Counsel for Amici Curiae

APRIL 29, 2005